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TO: JOANNE SIMPSON, FISCAL ANALYST, LEGISLATIVE FISCAL BUREAU

FROM: Robert J. Conlin, Senior Staff Attorney

SUBJECT: Effect of Recent U.S. Supreme Court Case on W-2 Residency Requirement

You requested a memorandum discussing the effect of a recent U.S. Supreme Court case on Wisconsin's 60-day residency requirement for eligibility for Wisconsin Works (W-2) employment positions. This memorandum describes that case, describes Wisconsin's 60-day residency requirement and provides an analysis of the possible effects of that case on Wisconsin's residency requirement.

1. Saenz v. Roe

On May 17, 1999, the U.S. Supreme Court, in *Saenz v. Roe*, __ U.S. __, 1999 U.S. LEXIS 3174 (1999), concluded that California's "two-tier" welfare benefits system violated the U.S. Constitution's Fourteenth Amendment and held that Congress could not authorize states to violate the Fourteenth Amendment. The issue before the Supreme Court was whether California's welfare law, which provided different benefit levels based on the recipient's length of residence in the state, was unconstitutional. Generally, under California's welfare law, individuals who resided in California for fewer than 12 months were eligible for welfare benefits equal to the lesser of: (a) California's benefits; or (b) the benefits they would have been eligible for in their prior state of residence.

The Court began its analysis by noting that the case involved a citizen's right to travel from one state to another [*Saenz v. Roe*, __ U.S. __, 1999 LEXIS at 16.]. The Court explained that the constitutional right to travel has at least three components:

> It protects the right of the citizen of one state to enter and to leave another state, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second state, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that state. [*Saenz* at 19.]

The Court concluded that it was the third element, the right of travelers who elect to become permanent residents to be treated like other citizens of that state, that was implicated by California's two-tier welfare scheme. The Court characterized that right as the "right of the

newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same state." [*Id*. at 23.] The Court stated that this aspect of the right to travel is protected not only by the new arrival's status as a state citizen, but also by his or her status as a citizen of the United States under the Fourteenth Amendment to the U.S. Constitution. The Fourteenth Amendment provides in relevant part:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall bridge the privileges or immunities of citizens of the United States; . . . .

Because the third element of the right to travel is protected by the Fourteenth Amendment, the Court concluded that any infringement of the right is subject to the highest level of scrutiny: strict scrutiny. [*Id*. at 25-26]. Generally, when the Court applies strict scrutiny to a law, in order to be constitutionally valid, the law must further a compelling governmental interest and be narrowly tailored to achieve that interest. The Court found that California's law could not survive this level of scrutiny. The Court analyzed four principal lines of argument in striking down the law.

First, the Court held that California's two-tier welfare benefits scheme could not pass constitutional muster based on the argument that it affected a person's right to travel "only incidentally." The Court stated that because the right to travel embraces the citizen's right to be treated equally in his or her new state of residence, the discriminatory classification is itself a penalty. The "incidental" effect was irrelevant to the Court's inquiry. [*Id*. at 27]

Second, the Court concluded that the state's desire to save public funds by imposing the two-tier scheme was not sufficient to justify the discriminatory manner in which the state sought to save money. [*Id*. at 30.] The Court noted that the Fourteenth Amendment equates citizenship with residence and that the "clause does not provide for, and does not allow for, degrees of citizenship based on length of residence." [*Id*., internal citations omitted.]

Third, the Court rejected any notion that a state could base its discriminatory actions on a policy that sought to distinguish between residents based on their tax contributions. It quoted a previous Supreme Court decision holding that to allow a state to discriminate between residents based on their length of residence to account for the difference in their relative tax contributions would:

> . . . logically permit the state to bar new residents from schools, parks, and libraries or deprive them of police and fire protection. Indeed it would permit the state to apportion all benefits and services according to the past tax contributions of its citizens. [*Id*. at 31, internal citations omitted.]

Finally, the Court concluded that Congress did not have the authority to permit states to violate the Fourteenth Amendment. [*Id*. at 32.] Accordingly, those provisions of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) which authorize

states to enact two-tier welfare benefit schemes like California's did not save the California law from its constitutional deficiencies.

Accordingly, the Court concluded that the justifications put forth by California for its two-tier welfare scheme were not sufficient to justify discriminating between state residents.

2. Wisconsin Law

Section 49.145 (2) (d), Stats., provides that an individual is eligible for a W-2 employment position only if the individual meets, among other things, the following requirement:

> The individual has resided in this state for at least 60 consecutive days prior to applying under s. 49.141 (3) and, unless the person is a migrant worker, has demonstrated an intent to continue to reside in this state.

Thus, in Wisconsin, in order to be eligible for a W-2 employment position, an individual must have resided in this state for at least 60 consecutive days prior to applying and, unless the person is a migrant worker, demonstrate an intent to continue to reside in the state.

3. Analysis

It should be noted that the Court in *Saenz* did not specifically address a residency requirement like Wisconsin's 60-day residency requirement. The law at issue in the *Saenz* case was different on its face from the Wisconsin statute cited above in at least three ways. First, the California law treated new residents differently for 12 months. Wisconsin treats new residents differently for only 60 days. Second, the California law, in essence, created numerous subclasses of individuals who were treated differently because new residents' benefits were tied to the benefits those individuals received in other states. Wisconsin's law creates two classes: individuals who have resided in the state for more than 60 days and those that have resided in Wisconsin for fewer than 60 days. Finally, the California scheme involved the provision of lower benefits to new residents. Wisconsin's law denies eligibility for an employment position benefit. However, given the breadth of the constitutional principles at issue in *Saenz*, and the Court's treatment of them, it appears that the dissimilarities between Wisconsin's residency requirement and the two-tier benefit law in California may not make a difference if Wisconsin's law were to be challenged.

It should also be emphasized that the decision in *Saenz* involved a law that made distinctions between ***residents***. It did not address laws that make distinctions between residents and nonresidents.

With respect to residents of Wisconsin, Wisconsin's law makes a distinction between persons who have resided in the state for less than 60 days and persons who have resided in the state for more than 60 days. Applying the rationale of the *Saenz* decision, a compelling case can be made that the same "travel rights" that were implicated in *Saenz* are implicated by the Wisconsin residency requirement, i.e., a new arrival who has taken up residence in the state faces discrimination based on his or her status as a new arrival. As the Court noted in *Saenz*,

"Since the right to travel embraces the citizen's right to be treated equally in her new state of residence, the discriminatory classification is itself a penalty." [*Saenz* at 30.] As applied to a person who has resided in Wisconsin for less than 60 days, the Wisconsin statute creates a degree of citizenship based on length of residence which, according to *Saenz*, is prohibited by the Fourteenth Amendment.

The distinction between the California law and the Wisconsin law may become relevant in at least two possible ways in a constitutional challenge to Wisconsin's law. First, it might be argued that Wisconsin's requirement that a person reside in this state for 60 days and show an intent to continue to reside in this state is nothing more than a test of residency. In other words, a person, under this rationale, is not considered a resident until he or she has been in this state for 60 days and shows a continued intent to reside here. Thus, the argument could be made that Wisconsin's law does not create classifications of residents and, therefore, the rationale of *Saenz* does not apply. However, this argument is weakened by at least two elements of Wisconsin's law.

First, the statute which contains the 60-day requirement provides that a person is not eligible until he or she "has resided" in the state for at least 60 days. This language seems to recognize that the person is a resident. Second, s. 49.001 (6), Stats., which provides definitions applicable to public assistance programs, including the W-2 program, defines "residence" to mean the "voluntary concurrence of physical presence with intent to remain in a place of fixed habitation. Physical presence is *prima facie* evidence of intent to remain." Since the residency requirement in s. 49.145 (2) (d), Stats., does not provide that the definition of "residence" in s. 49.001 (6) is inapplicable to it, it appears reasonable to conclude that the 60-day requirement does not define residency, but rather sets a limit on the length of residency required to qualify for W-2 employment position benefits.

The second argument that could be made that *Saenz* does not apply to Wisconsin' 60-day requirement is that the Wisconsin 60-day requirement does not penalize an individual's right to travel. This was the position taken by the Wisconsin Supreme Court in *Jones v. Milwaukee County*, 168 Wis. 2d 892, 485 N.W.2d 21 (1992). In that case, the Wisconsin Supreme Court concluded that a provision in Wisconsin's former general relief program that required a person to be a resident for 60 days to qualify for benefits did not operate to penalize an individual's right to travel. The court noted that while previous U.S. Supreme Court cases had found a one-year residency requirement unconstitutional, a 60-day waiting period was so "substantially less onerous . . . that it does not operate to penalize an individual's right to travel." [*Jones v. Milwaukee County*, 168 Wis. 2d at 485 N.W.2d at 26.]

The U.S. Supreme Court in *Saenz*, however, appears to have substantially weakened such reasoning when it concluded that the right to travel includes the right of persons who elect to become residents of a new state to be treated like other residents of that state. The Court said that because the case involved discrimination against citizens who have completed their interstate travel, the incidental effect on their right to travel was not an issue. Instead, the Court concluded that the discriminatory classification was itself a penalty. [*Saenz* at 27.] Thus, a strong case can be made that the length of time involved in creating classifications between residents does not matter in determining the constitutionality of a residency requirement under the rationale of *Saenz*.

Ultimately, if a court were to find that the Wisconsin residency requirement discriminates against new residents, the state would need to show a compelling governmental interest to justify the discrimination and that the method of achieving that interest is narrowly tailored to meet that end. Based on *Saenz*, it is clear that protection of the public fisc, the discouragement of interstate travel, or the recognition of the differing tax contributions of those involved are not sufficient justifications to save a statute which violates the Fourteenth Amendment. Thus, the burden would be on the state to show some compelling governmental interest to justify the 60-day residency requirement.

4. Conclusion

Although on its face, Wisconsin's 60-day residency requirement differs from the California law at issue in *Saenz*, it appears that the holding in *Saenz* is broad enough to apply to the Wisconsin statute so as to make those distinctions inconsequential as applied to residents of Wisconsin. Accordingly, if a resident who has resided in the state less than 60 days were to challenge the constitutionality of the state's 60-day residency requirement, it is probable that a court, applying the rationale of *Saenz*, would find that the provision discriminates against newly arrived residents in violation of the Fourteenth Amendment to the U.S. Constitution and, consequently, would require the state to show that the statute furthers a compelling governmental interest in order to pass constitutional muster. If the state were unable to make the requisite showing, the law would be invalidated.

If you have any additional questions on this matter, please feel free to contact me at the Legislative Council Staff offices.

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